FILE COPY

No. 638

FILED
MAR 3 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No.

October Term, 1947

JOHN MELLON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

LOUIS HALLE,
Counsel for Petitioner.

EDWARD HALLE,
On the Brief.

INDEX TO PETITION

PAGE

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit 1

A. Statement of the Case 2

Summary of Evidence against Petitioner 7

B. The Questions Presented 8

C. Reasons Relied on for Allowance of the Writ 9

INDEX TO BRIEF IN SUPPORT OF PETITION

ARGUMENT 11

I. The Government wholly failed to prove the commission by the appellant of the offense charged in Count One 11

II. In any event, the conviction should be set aside because it is based entirely on appellant's alleged confession, which was uncorroborated 14

III. The trial court committed reversible error in allowing Counts Three, Five and Seven to go to the jury when it was patent that no evidence in proof thereof had been established by the Government 16

CONCLUSION 19

PAGE

Table of Cases Cited

Daeche v. United States, 250 Fed. 566 (C. C. A. 2) 14

Fiswick v. U. S., 329 U. S. 211, 67 S. Ct. 224 9
Forte v. United States, 94 Fed. 2d 236 (C. C. A.) 14

People v. Jaffe, 185 N. Y. 497 13

United States v. Warszower, 113 Fed. 2 100 (C. C. A. 2) 14

Statute Cited

Title 18, U. S. Code, Sec. 72 1

IN THE

Supreme Court of the United States

No.

October Term, 1947

JOHN MELLON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, John Mellon, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, made in a per curiam opinion, on December 15, 1947, affirming a judgment of conviction of the District Court for the Eastern District of New York convicting petitioner of a violation of Title 18, U. S. Code, Sec. 72.

Sentence of two years imprisonment was imposed, execution thereof suspended and petitioner was placed on probation for a period of five years.

Petition for rehearing was duly filed in the Circuit Court of Appeals which was denied without opinion on January 7, 1948. The time for filing this petition was enlarged to March 5, 1948, by order of this Court dated January 29, 1948.

A.

Statement of the Case

The petitioner, John Mellon, and one Alfred Salerno, were indicted jointly in an indictment containing seven counts. The first six counts were substantive counts alleging violations in furnishing forged bail bonds for a Michael Pecoraro (Counts One, Three and Five) and a Sam Gross (Counts Two, Four and Six). Count Seven was a conspiracy count alleging that the defendants conspired to furnish forged bail bonds for the mentioned individuals.

At the opening of the trial, the Assistant United States Attorney's motion to sever as against Salerno was granted (f. 94). At the close of the Government's case, petitioner's counsel moved to dismiss all the counts of the indictment and asked for a directed verdict of acquittal. The Court thereupon granted the petitioner's motion as to Counts Two, Four and Six which related to furnishing the bond for Sam Gross on the ground that there was no proof connecting the petitioner with that bond (ff. 302; 304-307).

The case went to the jury on Counts One, Three, Five and Seven and the jury returned verdicts of guilty on all four of the said counts (ff. 503; 504).

The Court, on its own motion, then directed a judgment of acquittal as to Counts Three, Five and Seven (f. 525), after the Assistant District Attorney moved for a judgment of acquittal as to the said counts on the ground that the Government failed to sustain its burden of proof with regard thereto (f. 517). These counts alleged that Salerno was the person who actually forged the bonds (ff. 53; 54; 64-66; 76-80; 85; 86).

Of the original seven counts, therefore, only Count One, upon which the petitioner was sentenced, remains for the consideration of this Court.

Count One charges a violation of Title 18, U. S. C. A., Sec. 72. The substance of this count is that the petitioner and one Salerno, aiding, abetting and counseling each other, on or about the 20th day of February, 1940, forged and caused to be forged a certain bond (guaranteeing the appearance in court of Michael Pecoraro) and that the petitioner and Salerno forged and counselled to be forged and caused to be forged the signature "Charles D. Martineau", a necessary and material part of the said bond, for the purpose of defrauding the United States, contrary to Statute (ff. 18-36).

Exhibit 2, upon which Count One of the indictment is based, is an appeal bond in the sum of $3,000, guaranteeing the appearance of Michael Pecoraro before the District Court of the United States for the Eastern District of New York, upon notification of filing of the Mandate of the United States Circuit Court of Appeals, and that he abide by and perform any judgments which might be rendered and surrender himself when required. This bond is signed by Michael Pecoraro as principal and Charles D. Martineau as surety, and was acknowledged before United States Commissioner Edward E. Fay, on the 20th day of February, 1940. On the reverse side of the exhibit is an affidavit of Charles D. Martineau, as surety, stating that he is the owner of real estate at No. 56-58 South 9 Street, Brooklyn, N. Y. (Exhibit 2). The said bond was produced by John Scott, a Deputy Clerk of the Criminal Division of the United States District Court for the Eastern District of New York, who testified for the Government (ff. 102-107).

This bond was fixed by order of Judge Moscowitz of the District Court on February 20th, 1940 (ff. 118; 119). Deputy

Clerk Scott, however, did not know whether Gross and Pecoraro were released on bail pending appeal. He did presume that they were (f. 108). There is no direct evidence in the record that either Gross or Pecoraro were released on bail.

Commissioner Edward E. Fay, who testified for the Government, stated that he had no present recollection of the Charles D. Martineau who appeared before him on February 20th, 1940, and executed the bond, Government Exhibit 2 (f. 125). However, he testified that it was the usual procedure to ask the individual making the bond if the facts set forth in the bond are true and that he did so in this case (ff. 127; 128).

The petitioner, John Mellon, and one George LaFante owned jointly the property at 56-58 South 9 Street, Brooklyn, N. Y., which they had purchased from the New York State Superintendent of Insurance in July, 1939 (ff. 325-330; 133-138). LaFante also used the name Charles D. Martineau in 1940 (ff. 132; 133) and at the time that title to this property is relevant to this case, during February, 1940, while the property was owned jointly by Mellon and LaFante, the deed was in the name of Charles D. Martineau (f. 137).

On February 13, 1940, both the petitioner and LaFante were incarcerated in the Tombs Prison, 102 Centre Street, in the City of New York on a charge unrelated to this case (ff. 339-343). Petitioner left the Tombs about three months after he was arrested (f. 360). A lawyer by the name of Jackman, who represented them, visited them in jail about a week after their arrest, and stated in the presence of LaFante that a friend of Pecoraro's wanted to know if the petitioner would make bail for him by putting up the property as collateral (f. 403). Petitioner then stated to Jackman that he was willing and that LaFante was willing

and that they agreed (ff. 343-349). There was no conversation about being paid for this collateral (ff. 351; 352). Petitioner did not give either the deed or the tax bill to the property to Jackman on the occasion of his visit to the jail, nor did he give him any instructions as to the writing of a bail bond (ff. 355; 356). Petitioner did not sign any papers in connection with these bail bonds (ff. 366; 367). Jackman was to receive an interest in this property as his attorney's fee for representing petitioner and LaFante (f. 392) and he received all of the papers relating to it from the police on or about February 20, 1940, after petitioner's mentioned arrest (ff. 414, 415).

Later, on or about December 14, 1944, the petitioner, who was then on parole, reported to the office of the parole board according to parole routine (ff. 242; 367; 368). He was examined again on December 18, 1944 (f. 244). It is fairly definite that on the second date Mr. Feldman, the parole officer, and the petitioner were the only ones present (f. 244), but there is some confusion as to who was present on the 14th and as to what the petitioner said at that time.

Mr. Bernard Simmons, Feldman's superior (f. 368), stated that he was present at an interview of the petitioner, that Feldman was also present, but makes no mention that anyone else was present, and although he was present during the entire interview he heard no mention concerning the property or the bonds of Pecoraro or Gross (ff. 232-240).

Mr. Feldman testified that on December 14, Mr. Ralph Lewis of the Federal Bureau of Investigation was present (f. 247) along with Mr. Simmons, the petitioner and himself (f. 246), and that petitioner said he felt that the Federal Government would catch up with him in regard to forgery of a bail bond (f. 247). He stated that petitioner was not willing to discuss the subject further unless he was guaranteed a short sentence (f. 248).

Mr. Ralph Lewis of the F.B.I., testified that petitioner told him in December, 1944, that he had made arrangements with a man to take the deed and tax receipts and forge the name Charles D. Martineau to the necessary papers to arrange bond for Pecoraro, and that petitioner told him that these arrangements were made *before February 13, 1940* (ff. 264; 272; 273). On the 18th of December, 1944, Lewis was not present (f. 251), but Feldman testified that petitioner told him on that date that he had furnished bond for Pecoraro and had used the name Martineau (f. 248).

Petitioner, in his defense, testified that although he did tell the officers that he was the owner of the property, and that he authorized its use as collateral for the bond, he did not say to either Feldman, Lewis or anyone else that he made arrangements for the forging of the bond (f. 369). All he wanted to know at that time was, if it could be shown that he was connected with this bond in any way—if it could cause him to go back to states prison on his parole; and he was advised that it wouldn't (ff. 371-373). He denied that he ever gave any instructions or aided or abetted in making arrangements for the furnishing of a bond for Pecoraro (ff. 356; 362-364).

It should be noted that officer Lewis voluntarily corrected his testimony to say that at no time did petitioner use the word "forgery" during his interrogation (ff. 448, 449).

George LaFante's testimony is not illuminating. It reveals that he did not remember any fact concerning the year 1940 with any particularity. The only facts that he was apparently positive about were that he used the name Martineau (f. 133) and that he did not authorize anyone to sign the name Martineau on the bond (f. 143). He did however identify the following as being written by himself:

"March 26, 1945

To whom it may concern:

The property on So 9th St. in Brooklyn was purchased by me for Mr. J. H. Mellon.

I had $400.00 invested in it, and it was purchased in an assumed name.

Anything that J. H. Mellon did with it or wanted to do with said property was alright with me.

GEORGE LAFANTE" (Deft. Ex. C).

The Indictment which was found on February 14, 1945 (ff. 2; 486) charged the offense was committed on February 20, 1940 (f. 18). The trial was begun on October 14, 1946 (f. 92).

Summary of Evidence against Petitioner

Corpus delicti for the crime was sought to be established by placing the bond (Govt. Ex. 2) in evidence, and by establishing that LaFante (Martinau) did not sign or authorize anyone to sign the name Martinau to it. There is no evidence as to who actually signed the bond, or who presented it before the commissioner. In this connection Count One recites Martinau as an alias of the defendant Salerno, and Count Three and Count Five charge that Salerno was the active agent in presenting the bond and making certain false statements, and that Salerno as Martinau was aided, directed, etc., by Mellon. Salerno, however, was not a witness on the trial.

Assuming, *arguendo*, that it was properly established that the bond in question was forged, the only evidence connect-

ing petitioner with such forgery is the testimony of his alleged statements against interest.

It is submitted that (1) the statements against interest did not amount to a confession of the crime charged in Count One of the indictment and (2) the corpus delicti was not established. The argument for these propositions appears more fully in Points I and II of the brief submitted herewith.

B.

The Questions Presented

The following questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals.

(1) Did the Government prove the Commission by petitioner of the offense charged in Count One of the indictment?

(2) Was it reversible error to deny petitioner's motion to dismiss Count One of the indictment on the ground that proof thereof by petitioner's uncorroborated alleged confessions was insufficient?

(3) Was reversible error committed in the failure to dismiss Count One of the indictment when the Court dismissed Counts Three, Five and Seven, for lack of proof, the jury having found verdicts of guilty on all four Counts, after deliberating thereon upon instruction of the Court?

C.

Reasons Relied on for the Allowance of the Writ

In the decision sought to be reviewed, the Circuit Court of Appeals has affirmed a judgment of conviction by the District Court where the record of the trial contains no evidence to support such conviction. It is indeed strange enough in itself that of a grand total of seven Counts, concerning the alleged forgery of two bail bonds, the trial court refused to permit three to go to the jury because of lack of proof, and as to the four remaining, dismissed an additional three for lack of proof, even after the jury returned verdicts of guilty thereon. The fact that the jury did find verdicts of guilty on them shows a basis of error for the verdict of guilty on Count One, for which it is contended by petitioner no proof existed. The task of the jury, who are laymen, is difficult enough when their deliberation concern Counts for which they have heard proof. However, when they are called upon to deliberate on four Counts, three of which had no proof in evidence on which to deliberate, their confusion is patent when the verdict returned is guilty, on all four Counts. It is to be presumed, therefore, that the verdict of guilty on all four Counts was the result of a misapprehension as to duty, rather than valid deliberations. Such action does not reflect proper trial procedure.

The Trial Judge himself must have had misgivings even as to the lack of proof for Count One, which he did not dismiss, since he suspended sentence on the petitioner, a third offender (ff. 323-325; 526; 527).

This conviction is a most serious one and not merely of academic interest (*Fiswick* v. *U. S.*, 329 U. S. 211, 67 S. Ct. 224). It brands the petitioner as a third offender and sub-

jects him to a mandatory sentence of life imprisonment upon being convicted of a fourth offense in New York State, where petitioner resides, if it is allowed to stand.

In view of the indicated lack of proof in the entire trial by the dismissal of six Counts out of seven, the verdict of guilty manifestly against the weight of credible evidence on at least three of the four Counts sent to the jury, and the seriousness of the consequences to the petitioner, this Honorable Court should grant certiorari and exercise its supervisory jurisdiction herein.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated: February 26th, 1948.

JOHN MELLON
Petitioner

By

LOUIS HALLE
Counsel for Petitioner

IN THE

Supreme Court of the United States

No.

October Term, 1947

JOHN MELLON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

ARGUMENT

POINT I

The Government wholly failed to prove the commission by the appellant of the offense charged in Count One.

As stated, this count alleges that on February 20, 1940, the petitioner arranged for and aided and abetted a person to use the name of Charles D. Martineau and to execute in that name a bond on appeal in the sum of $3,000 on behalf of Michael Pecoraro upon an appeal taken by him from a judgment of conviction entered in the District Court.

To prove this charge the Government introduced the testimony of Lewis and Feldman, as mentioned, as to the alleged confession by the appellant.

Feldman's testimony fixes no date when petitioner said the bond was executed but Lewis' testimony is to the effect

that petitioner told him it occurred *prior to February 13, 1940* (ff. 273; 288-289). "Definitely prior to February 13th" (f. 289).

Lewis' testimony, therefore, as to said alleged confession, can in no way relate to the bond executed on February 20th, 1940, and can in no manner be competent as proof as to the subject matter of Count One.

In other words, the indictment is limited to the specific bond on appeal, executed on February 20th, 1940, as set out in Count One thereof. Said Count One does not charge the defendants named therein with any agreement to do anything in the future.

The question therefore presents itself: Could the defendants named in said Count One have aided, abetted, and counseled each other, on or before February 13th, 1940, to forge this particular bond which was executed on February 20th, 1940, when the record of the trial discloses that the order allowing Pecoraro on bail pending his appeal, and the amount thereof, was not made before February 20th, 1940 (ff. 118; 119).

On February 13th Pecoraro had not yet been sentenced. He was sentenced on February 14th (f. 292). Pecoraro was not under arrest to be released on his giving bail, he was in custody on a judgment of conviction. At that time no bail was allowed or fixed by the court.

The most that could be said for the evidence is that the petitioner knew, prior to February 13th, that Pecoraro was convicted and awaiting sentence and that he, appellant, wanted to arrange for Pecoraro's release on bail.

But a very important element is lacking: Did the petitioner, prior to February 13th, have the power to commit the offense of aiding, abetting and counselling the forging of the $3,000 bond set out in Count One of the indictment? How could he carry through prior to the time when the

order allowing the bail and fixing the amount was made by the court?

In the case of *People* v. *Jaffe*, 185 N. Y. 497, 500, the Court states, in referring to the defendant:

> "He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact."

At page 501 the Court further stated:

> "* * * The crime of which the defendant was convicted necessarily consists of three elements: first, the act; second, the intent; and third, the knowledge of an existing condition. There was proof tending to establish two of these elements, the first and second, but none to establish the existence of the third. This was knowledge of the stolen character of the property sought to be acquired. There could be no such knowledge. The defendant could not know that the property possessed the character of stolen property when it had not in fact been acquired by theft."

In the case at bar, regardless of the petitioner's guilty intent, he could not have committed the crime charged on or about February 20th. Whatever the petitioner did prior to February 13th, could not have been towards forging the bond executed on February 20th, for the reason that on the 13th of February, or prior thereto, the petitioner could not have been charged with knowing that an order would be made on the 20th, allowing the bail and fixing the amount.

In moving to dismiss the motion was also made on the ground that there was no proof connecting the petitioner with the bond mentioned in Count One (f. 302), and the learned Court below obviously erred in denying it (f. 312).

POINT II

In any event, the conviction should be set aside because it is based entirely on appellant's alleged confession, which was uncorroborated.

The Courts in the United States have adopted a fixed rule that corroboration of a confession is necessary and there can be no conviction of an accused in a criminal case upon an uncorroborated confession.

> *Daeche* v. *United States,* 250 Fed. 566, C. C. A. 2;
> *Forte* v. *United States,* 94 Fed. 2d 236, C. C. A. Dist. Col., citing *Daeche* v. *United States.*

And such corroboration is not sufficient if it tends merely to support the confession, without substantial independent evidence (*Forte* v. *United States, supra*).

This Court held in the *Daeche* case (p. 571) that "some sort of corroboration of a confession is necessary to conviction * * * ".

See also,

> *United States* v. *Warszower,* 113 Fed. 2d, 100, C. C. A. 2, affd. 312, U. S. 342.

The Government failed to establish the *corpus delicti* by competent proof in that there was no proof to establish beyond a reasonable doubt that the signature "Charles D. Martineau" on the bond (Gov. Ex. 2) was a forgery. The various Counts of the indictment charge that Salerno's alias was Charles D. Martineau (ff. 17; 37; 49; 55; 62; 67; 73). LaFante testified that he used the name Martineau

in 1940 and that he held the property under that assumed name (f. 133). However, he stated in writing that he held the property under that name for petitioner, and that anything petitioner did with it was approved by him (Def. Ex. C). Therefore, assuming that petitioner directed Salerno to deal with the property as Martineau, that Salerno was also known as Martineau, and that he signed the name Martineau, the result is that he did what he had a perfect right to do and that no forgery in fact was committed. The testimony of LaFante that he did not sign, or authorize anyone to sign, the bond with the name Martineau is of no effect, since he admitted he held it for petitioner and he also affirmed that anything petitioner did with it was alright with him. The burden is on the Government to establish that the bond was forged. This burden is not sustained by the type of evidence introduced at the trial.

In the final analysis there is no testimony by any of the witnesses to show who signed the bond and that the person who signed was not in fact what he represented himself to be or that he was unauthorized to act as he did.

The Government utterly failed to meet this basic requirement. The motion to dismiss, made on this ground (ff. 301, 302) should have been granted and it was error to deny it (f. 312).

POINT III

The trial court committed reversible error in allowing Counts Three, Five and Seven to go to the jury when it was patent that no evidence in proof thereof had been established by the Government.

The three mentioned Counts all allege that one Salerno actually forged the appeal bond. The Government severed as to Salerno at the outset of the trial (f. 94). He did not appear as a witness. No witness identified him as the signatory of the bond (no one knew who signed the bond), and no documentary evidence mentioned his name. It was perfectly clear, after the defendant rested, that Counts Three, Five and Seven were devoid of evidentiary support and remained bare allegations in the indictment. To burden the jury with these Counts was most prejudicial to petitioner. This is borne out by the request of the jury to the Court to furnish further instructions as to the various Counts (f. 491). The Court thereupon instructed as to each Count:

As to Count Three:

> "That is to say, the said bond falsely and fraudulently represented that Salerno was Martinau and falsely represented that he, the defendant, was Charles D. Martinau, the owner of the real estate 56-58 South 9th Street, valued at $15,000, subject to a mortgage of $3,650, whereas in truth and in fact, as the defendants then and there well knew, the defendant Salerno was not Martinau and he did not own the real estate in question" (f. 496).

As to Count Five:

"* * * that he, Salerno, with several aliases, would depose and certify truly, and that the defendant Salerno did, wilfully and contrary to said oath, falsely state a material matter which he knew to be untrue: to wit, that he, Salerno, was the owner of the real estate 56-58 South 9th Street, whereas in truth and in fact the defendant knew that he was not the owner of that property, and that he did not believe himself to be the owner of the said property" (ff. 497; 498).

As to Count Seven:

"* * * did conspire and agree to cause Salerno, with aliases, to falsely execute the name of Martinau deposing that he was the owner of the property 56-58 South 9th Street, and to falsely represent that Salerno was Martinau, the owner of the property, which was alleged to be valued at $15,000 subject to mortgage, whereas the defendants knew that that was untrue. That is what it means—all this verbiage—and that defendant then and there conspired and agreed to unlawfully, wilfully, knowingly and feloniously cause to be taken an oath by the defendant Salerno before the United States Commissioner Fay, in which there would be certified truly under oath a material fact, namely, that he was the owner of that property, whereas the defendants knew that he was not the owner, the purpose and plan of the conspiracy being that the defendants themselves and divers other persons whose names are to the Grand Jury unknown, caused Salerno to appear before the Commissioner and represent him to be Martinau and to be the owner of the property at 56-58 South 9th Street,

> valued at $15,000 subject to a $3,650 mortgage, and that he did execute or cause to be executed an appeal bond in the case of the United States v. Pecoraro and that 'the following overt acts were committed' " (ff. 499-501).

The Court thereupon instructed as to the conspiracy that none of the overt acts charged in the indictment were proved, but the Court did state unequivocally that:

> "If the Government proves that one or more steps were taken, although they are not the steps alleged in the indictment, nonetheless the Government has made out its case of a conspiracy—if it proves one or more overt acts to have been committed and that proof is beyond a reasonable doubt" (f. 502).

This charge was given even though it was apparent that no overt act of any conspiracy alleged in the indictment was proved by the Government.

Of course the error as to these three Counts was cured by their dismissal after verdict of guilty. But the most grave error, the effect of these Counts, to the prejudice of the petitioner as to Count One, on the deliberation of the jury remained. In view of the paucity of evidence on the entire trial, even as to Count One, the submission of all four Counts to the jury was reversible error.

CONCLUSION

It is respectfully submitted that this is a case which deserves review by this Honorable Court in the exercise of its supervisory power over federal criminal prosecutions under the rule of *McNabb* v. *United States*, 318 U. S. 332, 63 S. Ct. 608.

Respectfully submitted,

LOUIS HALLE,
Counsel for Petitioner.

EDWARD HALLE,
On the Brief.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Anderson v. *United States*, 124 F. 2d 58, reversed on other grounds, 318 U. S. 350	6
Daeche v. *United States*, 250 Fed. 566	5
Evans v. *United States*, 122 F. 2d 461, certiorari denied, 314 U. S. 698	5
Forte v. *United States*, 94 F. 2d 236	5
George v. *United States*, 125 F. 2d 559	6
Jordan v. *United States*, 60 F. 2d 4, certiorari denied, 287 U. S. 633	5
Ryan v. *United States*, 99 F. 2d 864, certiorari denied, 306 U. S. 635	5, 6
United States v. *Di Orio*, 150 F. 2d 938, certiorari denied, 326 U. S. 771	6
United States v. *Kertess*, 139 F. 2d 923, certiorari denied, 321 U. S. 795	5
Warszower v. *United States*, 312 U. S. 342	5

Statute Involved:

Criminal Code:	
Sec. 28 (18 U. S. C. 72)	2
Sec. 35(A) (18 U. S. C. 80)	3
Sec. 37 (18 U. S. C. 88)	3
Sec. 125 (18 U. S. C. 231)	3

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 638

JOHN MELLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 212-213) is reported at 165 F. 2d 80.

JURISDICTION

The judgment of the circuit court of appeals was entered December 15, 1947 (R. 213), and a petition for rehearing was denied January 7, 1948 (R. 219). On January 29, 1948, Mr. Justice Jackson extended to March 5, 1948, petitioner's time to file a petition for a writ of certiorari (R. 220), and the petition was filed March 3, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain petitioner's conviction on a charge of causing a bond to be falsely made for the purpose of defrauding the United States.

2. Whether there is sufficient independent evidence to corroborate petitioner's extrajudicial admissions.

3. Whether the trial court erred in permitting counts three, five and seven to go to the jury, when the state of the evidence was such that the court thereafter set aside the verdict of guilty as to those counts.

STATUTE INVOLVED

Section 28 of the Criminal Code (18 U.S.C. 72) provides in pertinent part:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States * * * shall be fined not more than $1000, or imprisoned not more than ten years, or both.

STATEMENT

A seven-count indictment was returned against petitioner and one Salerno in the District Court for the Eastern District of New York (R. 6-30). The first count charged that on or about February 20, 1940, petitioner and Salerno "did forge, and counsel to be forged, and cause to be forged" the signature "Charles D. Martineau" on the appeal bond of one Michael Pecoraro, in violation of Section 28 of the Criminal Code (18 U.S.C. 72). The third count charged that petitioner

and Salerno caused a false affidavit to be made in connection with the appeal bond, in which it was represented that Salerno was "Charles D. Martineau" and that he owned property at 56-58 South 9th St., Brooklyn, N. Y.; this was alleged to be a violation of Section 35(A) of the Criminal Code (18 U.S.C. 80). The fifth count charged that petitioner and Salerno "did take or cause to be taken" by Salerno a false oath in connection with the filing of the appeal bond, in violation of Section 125 of the Criminal Code (18 U.S.C. 231).[1] The seventh count alleged a conspiracy between petitioner and Salerno to commit the offenses charged in counts 1, 3, and 5 (Section 37 of the Criminal Code, 18 U.S.C. 88). Prior to trial, the Government was granted a severance as to Salerno (R. 32).

After a jury trial, petitioner was found guilty on counts 1, 3, 5, and 7 (R. 168). However, when he appeared for sentence two weeks later, the court granted a judgment of acquittal as to counts three, five and seven for insufficiency of evidence. Petitioner was then sentenced to two years' imprisonment on the first count, but execution of the sentence was suspended and he was placed on probation for five years. (R. 172-176.) The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit (R. 213).

The evidence for the Government may be briefly summarized as follows:

United States Commissioner Fay testified that on February 20, 1940, a man who said he was Charles D. Martineau appeared before him, executed an appeal bond for Pecoraro under oath in the name of Martineau, submitted an

---

[1] The second, fourth and sixth counts charged offenses of the same nature as the first, third and fifth, but in connection with the appeal bond of one Sam Gross. The second, fourth and sixth counts were dismissed by the court at the close of the Government's case for insufficiency of evidence (R. 101-103).

affidavit to the effect that he, as Martineau, was the owner of property at 56-58 South 9th Street, Brooklyn, New York, and handed to the Commissioner the deed and receipted tax bill for the property (R. 41-43).

George La Fante testified that he was also known as Charles D. Martineau; that he bought the property at 56-58 South 9th Street together with petitioner and title was taken in the name of Martineau; that he did not have the deed or the tax receipts in his possession on February 20, 1940, nor did he know who had them or where they were; that the signatures on the bond were not executed by him and could not have been so executed because he was in prison on February 20, 1940; and that he had not authorized anyone to present the deed and tax receipts to the commissioner and execute the appeal bond for Pecoraro, nor had he ever discussed the matter with petitioner (R. 44-49, 146-147).

Ralph Lewis, an F.B.I. agent, testified that petitioner stated to him on December 14, 1944, that he was a very close friend of Pecoraro; that he was the actual owner of the property at 56-58 South 9th Street; that some time in February 1940, prior to the 13th, he made arrangements with a man whom he refused to identify to take the deed and the tax receipts to the proper place and execute, in the name of "Charles D. Martineau," all the papers necessary to arrange bond for Pecoraro's release pending his appeal (R. 88-97, 149-152). This testimony was corroborated in part by witnesses Simmons (R. 78-80) and Feldman (R. 81-84).

ARGUMENT

1. We think it obvious that there was abundant evidence to support petitioner's conviction if the evidence of his admissions was competent and relevant.

Petitioner argues (Pet. 11-12) that this evidence is not relevant because, as he says, it referred to some bond executed prior to February 13, 1940, whereas the indictment charged execution on or about February 20, 1940. The testimony of the Government witnesses, however, was that petitioner admitted that he had *made arrangements* prior to February 13, 1940, for the execution of an appeal bond for Pecoraro. Petitioner also argues (Pet. 12-13), if we understand him correctly, that he could not have aided and abetted the forging of the appeal bond prior to February 13, because Pecoraro was not sentenced until February 14 and the order admitting him to bail was not entered until February 20. But it is obvious that the forgery could have been committed in pursuance of petitioner's previous directions.

2. Petitioner contends (Pet. 14-15) that the evidence of his admissions was not competent because it was not sufficiently corroborated by independent evidence. It is, however, well established that the independent evidence of the corpus delicti need not be "so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of the defendant's guilt beyond a reasonable doubt." *Jordan* v. *United States,* 60 F. 2d 4, 5 (C.C.A. 4), certiorari denied, 287 U. S. 633; see also *Warszower* v. *United States,* 312 U. S. 342, 345; *United States* v. *Kertess,* 139 F. 2d 923, 929 (C.C.A. 2), certiorari denied, 321 U. S. 795; *Evans* v. *United States,* 122 F. 2d 461, 465 (C.C.A. 10), certiorari denied, 314 U. S. 698; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C.C.A. 8), certiorari denied, 306 U. S. 635; *Forte* v. *United States,* 94 F. 2d 236, 240 (App. D. C.); *Daeche* v. *United States,* 250 Fed. 566, 571 (C.C.A. 2). And "proof of the identity of the perpetrator of the act or crime is not a

part of the corpus delicti." *United States* v. *Di Orio*, 150 F. 2d 938, 939 (C.C.A. 3), certiorari denied, 326 U. S. 771; see also *George v. United States*, 125 F. 2d 559, 563 (App. D. C.); *Anderson v. United States*, 124 F. 2d 58, 66 (C.C.A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States, supra.*

Here the commissioner testified that someone executed the bond as "Martineau," and La Fante, who held title to the property as "Martineau," testified that he had not authorized anyone to put up the property as collateral in that name. Petitioner makes much of the fact that La Fante signed a statement, addressed "to whom it may concern," to the effect that anything petitioner did with the property was "all right" with him. This statement, made on March 26, 1945, over five years after the execution of the Pecoraro bond and about six weeks after petitioner's indictment (see R. 1), and made moreover in response to a request by petitioner or his lawyer (R. 62-64, 67-71), is offset by La Fante's positive testimony at the trial that he did not authorize the use of the name "Martineau" on the bond (R. 48-49, 66, 147).

3. Petitioner contends (Pet. 16-18) that "in view of the paucity of evidence * * *, even as to Count One," the trial court committed prejudicial error in submitting to the jury counts three, five and seven, upon which the court directed that petitioner be acquitted after the jury had rendered a verdict of guilty. All the evidence offered and admitted, however, was relevant to prove the charge of count 1 as to petitioner. And by his own admission, he directed someone to sign the bond as "Martineau." In view of the overwhelming evidence of his guilt on count 1, petitioner was not prejudiced by the submission of the other counts to the jury.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General;
T. VINCENT QUINN,
Assistant Attorney General;
ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

March 1948.

U. S. GOVERNMENT PRINTING OFFICE, 1948